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No. 91-944

In the Supreme Court of the United States

OCTOBER TERM, 1991

COOPER ELECTRIC SUPPLY CO. and
RICHARD A. COOPER, PETITIONERS

v.

LYNN MARTIN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

MARSHALL J. BREGER
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

STEVEN J. MANDEL
Deputy Associate Solicitor

DEBORAH GREENFIELD
Attorney
Department of Labor
Washington, D.C. 20210

QUESTIONS PRESENTED

1. Whether petitioner's inside salespersons were "administrative" employees exempt from the overtime provisions of the Fair Labor Standards Act, 29 U.S.C. 213(a)(1).

2. Whether the court of appeals correctly determined that petitioner was liable for liquidated damages under 29 U.S.C. 217.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A28) is reported at 940 F.2d 896. The opinion of the district court (Pet. App. B5-B17) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 1991. A petition for rehearing was denied on September 13, 1991 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on December 10, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In general, Section 7(a)(1) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 207(a)(1), requires an employer to pay each of its employees "at a rate not less than one and one-half times the regular rate at which he is employed" for any hours worked in excess of 40 hours a week. Section 13(a)(1) of the Act, 29 U.S.C. 213(a)(1), provides an exemption, however, for any employee "employed in a bona fide executive, administrative, or professional capacity * * * (as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor])."

The Department of Labor has promulgated regulations defining the scope of the exemption for administrative employees. Under the "short test" applicable to the employees at issue in this case, the exemption is available if an employee's "primary duty" consists of (1) "the performance of office or nonmanual work directly related to management policies or general business operations of the employer or the employer's customers," and (2) "such primary duty includes work requiring the exercise of discretion and independent judgment." 29 C.F.R. 541.214(a); see Pet. App. A9 & n.4.[1]

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[1] The general definition of administrative employees is set forth in 29 C.F.R. 541.2. It sets forth four criteria (which are known as the "long test") for determining whether employees earning, with certain exceptions, $155 or more per week are administrative employees. Section 541.2 further provides, however, that employees earning not less than $250 per week who meet the two requirements of the "short test" set out in text shall be deemed to meet the other two requirements of the "long test."

Elaborating on the requirements of the "short test," the regulations define work "directly related to management policies or general business operations" as (29 C.F.R. 541.205(a)):

> those types of activities relating to the administrative operations of a business as distinguished from "production" or, in a retail or service establishment, "sales" work. In addition to describing the types of activities, the phrase limits the exemption to persons who perform work of substantial importance to the management or operation of the business.

Persons performing "work of substantial importance" within the meaning of that regulation are those whose activities "affect[] policy or whose responsibility it is to execute or carry it out," including "a wide variety of persons who either carry out major assignments in conducting the operations of the business, or whose work affects business operations to a substantial degree." 29 C.F.R. 541.205(c). Similarly, the regulations provide that the "administrative operations of the business include the work performed by so-called white-collar employees engaged in 'servicing' a business as, for example, advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control." 29 C.F.R. 541.205(b).

2. Petitioner Cooper Electric Company is a New Jersey corporation which operates an electrical supply business with approximately 120 employees, including inside salespersons. Pet. App. A5. Petitioner Richard Cooper is the president of the company. The company's inside salespersons have been paid a fixed salary plus incentive bonuses, but not overtime. The salespersons spend a majority of their time making

telephone sales of electrical products to contractors, industrial buyers, institutions, and government organizations. A small percentage of inside sales are made to individual consumers. Most of the goods sold by inside salespersons come from petitioners' in-house inventory. Salespersons normally obtain price quotations for these items from trade publications, computerized price sheets, manufacturer's representatives, and an in-house computer. Depending on the particular transaction, the inside salespersons may deviate from the price quotes to some degree. When an item is not in stock, the inside salespersons order it from the manufacturer, in which case they negotiate the cost to petitioners as well as to the customer. *Id.* at A5, A12-A13.

3. The Department of Labor brought this action against petitioners, alleging that they violated the overtime and recordkeeping requirements of the FLSA, 29 U.S.C. 207 and 211, with respect to inside salespersons and other employees. After a trial, the district court concluded that the inside salespersons do not satisfy the first element of the short test for the administrative exemption, finding that those salespersons do not perform "work directly related to [petitioners'] management policies or general business operations," 29 C.F.R. 541.214(a). Pet. App. B11-B12. The court determined that "inside salespersons spend nearly all their time on the telephone receiving orders from customers seeking to purchase electrical supplies." *Id.* at B12. "The narrow scope of [the salespersons'] responsibility," the court continued, compelled the conclusion that "they engage in activities relating to the day-to-day 'production' of sales within the plain meaning of [29 C.F.R. 541.205 (a)] rather than 'the administrative operations of a business.'" *Ibid.*

The court rejected petitioners' contention that their inside salespersons should be characterized as administrative employees because they "represent the company," "promote sales," and "negotiate" on behalf of the company. Pet. App. B12. Although petitioners' characterization of the salespersons' responsibilities meets "the literal language of the interpretive regulations," the court explained, "these activities are part and parcel [of] the inside salespersons[']' primary responsibility of producing sales," "the impact on administrative operations of the business is minimal," and the inside salespersons "are not engaged in 'servicing' the business so as to participate in [petitioners'] administrative operations." *Ibid.*

The district court also found that the inside salespersons do not, within the meaning of 29 C.F.R. 541.214(a), "perform[] work of substantial importance to the management or operation of the business of [their] employer or [their] employer's customers." Pet. App. B12-B13. Although "[i]t is axiomatic that a salesperson 'performs work of substantial importance' to any sales-oriented business," the court explained, any suggestion that petitioners' salespersons "carry[] out 'major assignments' is to strain interpretation of the regulation beyond common sense." *Id.* at B12. The court found that an inside salesperson's work "is to produce sales * * *, not to develop or implement specific work assignments consistent with an overall company policy." *Id.* at B13. In fact, the court continued, inside salespersons are not "formally assigned to particular customer accounts," but rather "randomly receive orders over the telephone from a variety of buyers." *Ibid.*

The court's judgment required petitioners to pay overtime compensation that had been withheld from the inside salespersons, with prejudgment and post-

judgment interest. The court declined, however, to award liquidated damages. With respect to that form of relief, the court ruled that petitioners "acted in good faith and had reasonable grounds for believing that the subject employees were exempt from the overtime and record keeping provisions of the Act." Pet. App. B15. Although petitioners "did not do any analysis or conduct any inquiry to determine whether the subject employees qualified for an exemption," the court reasoned, petitioners "followed the well-established and widely accepted industry practice" regarding such employees. *Ibid.* The court found further support for its conclusion in the fact that petitioners had changed their practices with respect to some employees (although not the inside salespersons) when the Department of Labor began its investigation. The court also ruled that there was a "legitimate, good faith dispute" as to whether the salespersons were exempt. *Id.* at B16.

4. The court of appeals affirmed the district court's determination that petitioners had violated the Act's overtime requirements with respect to inside salespersons, but remanded for an award of liquidated damages and vacated the award of prejudgment interest. Pet. App. A5-A28.

Like the district court, the court of appeals held that petitioners' inside salespersons do not satisfy the first element of the short test for administrative employees—which requires an employee to perform work "directly related to management policies or general business operations" of his employer, 29 C.F.R. 541.214(a). The court sustained the district court's finding that the salespersons "are production rather than administrative employees" within the framework established by the relevant regulations, rejecting petitioners' contention that only workers

engaged in the manufacture of tangible goods can be "production" workers. Pet. App. A13-A14.[2] The panel also upheld, as not clearly erroneous, the district court's determination that petitioners' inside salespersons "are not engaged in 'servicing' the business so as to participate in [petitioners'] administrative operations." *Id.* at A15-A17. Finally, the court of appeals held, as a matter of law, that petitioners' inside salespersons "do not 'perform work of substantial importance to the management or operation' " of petitioners' business. *Id.* at A18.

With respect to the remedy for petitioners' violations, the court of appeals noted that the FLSA requires an award of liquidated damages unless "the act or omission giving rise to such action was in good faith and [the employer] had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]," Pet. App. A21 (quoting 29 U.S.C. 260). Further, the court continued, an employer bears the burden of showing "that he took affirmative steps to ascertain the Act's requirements, but nonetheless violated its provisions." Pet. App. A22.

Here, the court of appeals held, "the district court erred as a matter of law by concluding that [petitioners] violated FLSA overtime requirements in *reasonable* good faith." Pet. App. A23. The panel found "dispositive" the district court's findings that petitioners "did not do any analysis or conduct any

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[2] The panel noted that 29 C.F.R. 541.205(a) outlines dichotomies between (1) the "administrative" and "production" operations of most businesses and (2) the "administrative" and "sales" operations of retail and service businesses. In this case, the court found, the relevant dichotomy was between "administrative" and "production" work. Pet. App. A10.

inquiry to determine whether [their] . . . employees qualified for an exemption" and that they "admitted * * [a] lack of diligence in determining the applicability of the Act's requirements." *Id.* at A25. The court of appeals addressed, and found insufficient, each of the grounds on which the district court had relied in declining to award liquidated damages. *Id.* at A25-A27. The panel concluded that "the district court had no discretion to deny liquidated damages for [inside salespersons] because, first and foremost, [petitioners] had not demonstrated that [they] took affirmative steps to ascertain the legality of [their] pay practices before Labor's investigation." *Id.* at A27.[3]

ARGUMENT

This case involves only the application of established legal standards to the particular facts of this case. The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1.a. Because the FLSA requires "broad coverage" to effectuate its goals, *Tony & Susan Alamo Found.* v. *Secretary of Labor*, 471 U.S. 290, 296 (1985), exemptions under the Act are limited to employees "plainly and unmistakably within their terms and spirit," *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960). An employer bears the burden of proving the applicability of an exemption. *Idaho Sheet Metal Works, Inc.* v. *Wirtz*, 383 U.S. 190, 206 (1966). The court of appeals' decision is consistent with these general principles and with the regula-

[3] The court vacated the district court's award of prejudgment interest, reasoning that liquidated damages would compensate employees for the delay in their receipt of overtime pay. Pet. App. A27 & n.13.

tions governing the availability of the FLSA's exemption for "administrative" employees.

Petitioners' inside salespersons cannot qualify for that exemption unless their "primary duty" consists of "the performance of office or nonmanual work directly related to management policies or general business operations" of petitioners or their customers. 29 C.F.R. 541.214(a). In resolving that issue, both lower courts properly considered whether the salespersons engage in "activities relating to the administrative operations of [petitioners'] business as distinguished from 'production' * * * work," and whether they "perform work of substantial importance to the management or operation of the business." 29 C.F.R. 514.205(a). As the court of appeals noted, those inquiries are "fact intensive." Pet. App. A12; see *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709, 713-714 (1986); *Dalheim* v. *KDFW-TV*, 918 F.2d 1220, 1226 (5th Cir. 1990).

The district court found, in essence, that petitioners' inside salespersons "spend nearly all their time on the telephone receiving orders from customers seeking to purchase electrical supplies" and that they "randomly receive orders * * * from a variety of buyers." Pet. App. B12, B13. While acknowledging that the salespersons' responsibilities are not purely ministerial and that their collective contribution to petitioners' business is significant, the court determined that "their impact on administrative operations of the business was minimal" and that they did not carry out "major assignments" in the business. *Id.* at B12. The court of appeals upheld those findings as not clearly erroneous, observing that the inside salespersons were "not more than routine functionaries, albeit important employees." *Id.* at A18. That

determination presents no issue of the sort calling for this Court's attention.

b. Petitioners' principal contention is that the inside salespersons cannot fairly be characterized as "production" workers. Pet. 4-8. That contention is based more on semantics than on substance. In the context of the regulations as a whole, it is crystal clear that the reference to "production" work was not intended as a reference to manufacturing employees. Rather, as both the lower courts recognized (Pet. App. A10, B11-B12), it describes one side of the distinction the regulations draw between the "administrative operations" of a business and the business's more routine functions; the purpose of that distinction is to separate "persons who perform work of substantial importance to the management or operation of the business" from those who do not. 29 C.F.R. 514.205(a).

The regulations recognize that many non-manufacturing workers, such as clerks and bank tellers, who "hold the run-of-the-mine positions in any ordinary business" are not administrative employees. 29 C.F.R. 541.205(c)(1). When an employer's business consists of wholesale sales, rather than the manufacture of tangible goods, it is entirely consistent with the scheme of the regulations to regard lower-level employees as involved in the "production" of sales. As the court of appeals recognized (Pet. App. A14), petitioners' interpretation would lead to the untenable result that all employees engaged in wholesale sales would qualify for the administrative exemption.

The courts of appeals have often recognized that the "production" workers to whom 29 C.F.R. 541.205(a) refers include employees not engaged in the produc-

tion of goods. *Dalheim*, 918 F.2d at 1230 (television producers); *Bratt* v. *County of Los Angeles*, 912 F.2d 1066, 1069-1070 (9th Cir. 1990) (probation officers), cert. denied, 111 S. Ct. 962 (1991); *Harris* v. *District of Columbia*, 741 F. Supp. 254, 262 (D.D.C. 1990) (housing inspectors); *Gusdonovich* v. *Business Information Co.*, 705 F. Supp. 262, 264-265 (W.D. Pa. 1985) (investigator). There is no conflict among the courts of appeals on that question.[4]

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[4] All of the district court cases on which petitioners and their amici rely (Pet. 7, 8, 14 n.9; Amicus Br. 7) are consistent with the court of appeals' decision in this case. In *Hodgson* v. *Penn Packing Co.*, 335 F. Supp. 1015, 1021 (E.D. Pa. 1971), the district court found that an inside salesperson who, like the employees in the instant case, spent "most of his time taking orders by telephone" and who normally did not "digress from the standard pricing sheet" was not an administrative employee. In other cases, employees performing more substantive tasks than petitioners' inside salespersons were held to qualify for the exemption for administrative employees. See *Gilstrap* v. *Synalloy Corp. Indus. Piping Supply Co. Div.*, 409 F. Supp. 621, 625-626 (M.D. La. 1976) (an employee whose primary duty was to formulate and implement a new system of inventory control did not forfeit the administrative exemption merely because the job required some inside sales); *Harrison* v. *Preston Trucking Co.*, 201 F. Supp. 654, 659 (D. Md. 1962) (exemption applicable to dispatcher who assigned freight and drivers, and recommended hiring, firing and scheduling changes); *Horne* v. *Singer Business Machs., Inc.*, 413 F. Supp. 52, 53 (W.D. Tenn. 1976) (exemption applicable to employee who devised and modified computer programs and participated in company policymaking); *McComb* v. *New York & New Brunswick Auto Express Co.*, 95 F. Supp. 636, 640 (D.N.J. 1950) (dispatchers "completely in charge of the operation" qualified as administrative employees).

It is true, as petitioners' amici note (Amici Br. 11), that "certain wholesale salesmen" may qualify for the exemption.

c. Petitioners also contend that their inside salespersons perform work of substantial importance to the management or operation of the business. Pet. 12-15. The lower courts' contrary determination, which involves only the application of the Department's regulation to the particular facts of this case, was well-founded. The lower courts have uniformly refused to equate activities which, like those of petitioners' inside salespersons, simply carry out the employer's "day-to-day * * * business affairs" (*Bratt*, 912 F.2d at 1070), with administrative-type work. See also *McComb* v. *Robert W. Hunt Co.*, 172 F.2d 751, 754 (7th Cir. 1949); *Harris*, 741 F. Supp. at 262; *Gusdonovich* v. *Business Information Co.*, 705 F. Supp. at 264-265.[5] In any event, review of the lower courts' finding on this question would serve no purpose; the regulation's reference to "work of substantial importance" serves only to clarify the standard set forth earlier in the same section of the regulations. That application of the "substantial impor-

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29 C.F.R. 541.207(d)(2). Accord *Penn Packing*, 335 F. Supp. at 1020-1021 n.3 ("an inside salesman meeting all of the requirements for executive or administrative personnel" is eligible). The lower courts properly considered whether petitioners' inside salespersons satisfied the generally applicable standards, and concluded that they did not.

[5] Petitioners are mistaken in suggesting that the court of appeals applied an incorrect standard of review to this issue. See Pet. 15. The court simply held that, on the findings made by the district court, the law compelled the conclusion that the salespersons do not perform work of substantial importance. The court of appeals did not suggest that application of the "work of substantial importance" standard invariably involves a pure issue of law.

tance" standard does not, therefore, present a free-standing issue calling for this Court's review.[6]

2. Petitioners also contend (Pet. 16) that they should not have been liable for liquidated damages because they "followed well established and accepted industry practice." In their view, the court of appeals' decision casts a new and onerous burden on employers who seek to comply with the law. *Id.* at 16-18.

It is well established, however, that an award of liquidated damages is mandatory unless an employer demonstrates both that it has acted in subjective "good faith" and that there are objective "reasonable grounds" supporting its position. *Williams* v. *Tri-County Growers, Inc.*, 747 F.2d 121, 129 (3d Cir. 1984); *Marshall* v. *Brunner*, 668 F.2d 748, 752 (3d Cir. 1982). To satisfy the subjective good faith re-

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[6] Petitioners also seek support for their position in cases addressing the question whether employees have "engaged in commerce," as opposed to the "production of goods for commerce," for purposes of the Act's jurisdictional requirement, 29 U.S.C. 207(a)(1). Pet. 8-12; see Amici Br. 10-11. Those cases are irrelevant to this case; there is no dispute that petitioners' inside salespersons are "engaged in commerce" and thus subject to the statute.

Nor is there any merit to amici's assertion (Amici Br. 5-6) that because inside salespersons perform a function comparable to that of outside salespersons, they too should be exempt from the FLSA's overtime provisions. Outside salespersons are exempt not because they are administrative employees, but because Section 13(a)(1), 29 U.S.C. 213(a)(1), expressly excludes them from the Act's overtime requirements. This statutory exclusion is based upon the virtual total control those employees enjoy over their working hours and upon their lack of direct supervision. See *Jewel Tea Co.* v. *Williams*, 118 F.2d 202, 208 (10th Cir. 1941). Petitioners' salespersons do not share those characteristics.

quirement, an employer must have had "an honest intention to ascertain and follow the dictates of the Act." See *Williams* v. *Tri-County Growers, Inc.*, 747 F.2d at 129 (under the objective reasonableness requirement, "[i]gnorance alone will not exonerate the employer").

Petitioners cannot satisfy those standards. The district court found that they "did not do any analysis or conduct any inquiry to determine whether the [inside salespersons] qualified for an exemption." Pet. App. B15. The courts have uniformly rejected claims that reliance on a company's or an industry's longstanding failure to pay overtime, unaccompanied by affirmative efforts to ascertain the law, will justify denying liquidated damages. *Brock* v. *Wilamowsky*, 833 F.2d 11, 19 (2d Cir. 1987). See *Tri-County Growers*, 747 F.2d at 129 (that employer has violated the law "for a long time without complaints from employees" does not show requisite good faith); *Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429, 465 (D.C. Cir. 1976) (same), cert. denied, 434 U.S. 1086 (1978); see also *Glenn* v. *General Motors Corp.*, 841 F.2d 1567, 1573 (11th Cir.) (rejecting market force theory), cert. denied, 488 U.S. 948 (1988). As the court below recognized, "[i]n lieu of any affirmative attempt by an employer to determine the legality of its wage payment practices, the employer's adherence to customary and widespread industry practices that violate the Act's overtime pay provisions is not evidence of an objectively reasonable good faith violation." Pet. App. A26.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

MARSHALL J. BREGER
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

STEVEN J. MANDEL
Deputy Associate Solicitor

DEBORAH GREENFIELD
Attorney
Department of Labor

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